No. 97-27

Supreme Court, U.S.
FILED
JUL 31 1997
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

COMMONWEALTH OF VIRGINIA, ex rel.,
SECRETARY OF THE COMMONWEALTH, et al.,

Petitioners,

v.

GERARD P. MISERANDINO and
KAREN L. MISERANDINO,

Respondents.

On Petition for Writ of Certiorari
to the Court of Appeals of Maryland

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BENJAMIN LIPSITZ,
100 Church Lane
Baltimore, Maryland 21208
(410) 484-3050,
Counsel of Record for
Respondents

QUESTIONS PRESENTED FOR REVIEW

1. (a) Did the Commonwealth of Virginia validly acquire original *in personam* jurisdiction, in an action jurisdiction over the Miserandinos, who were residents of Maryland, in an action *ex contractu* brought against them by Resort in a Virginia court under a Virginia substituted service statute authorizing service of process upon nonresident defendants solely by means of first-class mailing to them of relevant notices by the Secretary of the Commonwealth as statutory agent, without any requirement for proof of actual delivery or receipt?

(b) Did proceeding against them in that manner deprive them of due process of law, judgment by default having been entered against them in the Virginia action when they failed to appear (and they having sworn in the Maryland case brought by Resort to enforce that default judgment that they never received notice or process in the Virginia case?

2. Need Maryland afford any faith or credit to a Virginia default judgment against Maryland residents, where acquisition of original personal jurisdiction over the non-resident defendants was sought to be premised solely upon ordinary first-class mailing to them of relevant notices, without any requirement for proof of actual delivery or receipt, and where, in a Maryland proceedings to enforce that judgment, the defendants stated under oath that they had not received such notices?

3. Does the Commonwealth of Virginia have standing in this Court to challenge the constitutional propriety of the

disposition made of this case by the Court of Appeals of Maryland, when the Commonwealth did not in any manner participate in proceedings below until after the Court of Appeals of Maryland filed its opinion, although prior to issuance of its mandate, when Virginia sought both leave to intervene, which it was permitted to do, and reconsideration of the Maryland court's decision, which was denied?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases

Basile v. American Filter Service, Inc., 231 Va. 34 (1986)	6
Bryant v. Yellin, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980)	11
Director, Office of Workers Comp. Programs v. Perini North River Assocs., 429 U.S. 297, 305, 103 S.Ct. 634, 74 L.Ed.2d 465 (1963)	10
Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).	7
Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1992)	5

	Page
Griffin v. Griffin, 327 U.S. 320, 66 S.Ct. 556, 90 L.Ed. 665, reh. den. 328 U.S. 876, 66 S.Ct. 97, 90 L.Ed. 1645 (1966)	7
Imperial Hotel, Inc. v. Bell Atlantic Tri-Con Leasing Corporation, 91 Md.App.266, 603 A.2d 1371 (1992)	7, 8
Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)	5
Tulsa Professional Collection Service v. Pope 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)	6
Simon v. Eastern Kentucky Welfare Org., 426 U.S. 26, 39, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976)	10
Underwriters National Insurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc., 455 U.S. 691, 704, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982)	7
Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A.2d 812 (1966)	8
World-Wide Volkwagen Corp. v. Woodson, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)	7-8

STATEMENT OF THE CASE

Resort Properties, Inc. ("Resort"), as assignee of North Fork Shenandoah Vacations, Inc., obtained a judgment by default in the amount of $4,211.82 against Gerard P. Miserandino (who in the respective petitions for certiorari filed herein is incorrectly called "Gerald") Miserandino and Karen L. Miserandino, his wife, in the Warren County (Virginia) General District Court. In entering that default judgment the Virginia court sought to exercise long-arm personal jurisdiction over the Miserandinos, who were residents of Maryland, under a Virginia statute (Va. Code, Sec. 6.01-329), purporting to authorize service of process upon nonresidents by serving the Secretary of the Commonwealth, as statutory agent of such persons. The Secretary or his or her designee then is to send copies of the pertinent pleadings to a defendant's last known address, as set out in an affidavit to that effect supplied by the plaintiff, and is to certify that such papers have been sent. The Virginia statute requires neither actual delivery or receipt of the first-class mail nor any proof thereof.

Resort thereafter filed that default judgment in the Circuit Court for Carroll County, Maryland, where the Miserandinos resided, and the clerk of that court mailed them a notice advising that such filing had occurred. See Md. Code, Courts and Judicial Proceedings Article, Secs. 11-801-807 (1957, 1989 Repl. Vol., 1992 Cum. Supp.), which sets out Maryland's version of the Uniform Enforcement of Foreign Judgments Act. The Miserandinos moved to strike entry of

the foreign judgment, averring in part by affidavit made on personal knowledge that they were not served with process in, had no notice of, and did not appear in the Virginia action. The circuit court initially granted the Miserandinos' motion. Upon filing by Resort of a motion to alter or amend pointing out that in its order the court had cited the wrong statute, the court reheard the matter, reversed its ruling and recorded Resort's Virginia default judgment.

The Miserandinos appealed to the Court of Special Appeals, Maryland's intermediate appellate tribunal. That court affirmed, one member of its three-judge hearing panel dissenting. (The dissent asserted, in part, that it was not possible for either his court or the Virginia court to ascertain facially from the record in the case whether a prima facie factual basis was asserted in Virginia for proper invocation of its long arm statute.)

The Court of Appeals, Maryland's final appellate tribunal, granted certiorari. It declined, in part, to accept the proposition, embodied in the Virginia substituted service statute and advanced by Resort, that first-class mail service, without more, was sufficient to confer in personam jurisdiction upon the Virginia court. It hence declined to grant full faith and credit to the Virginia jydgment. It found that because of constitutional inadequacy of the notice authorized by the Virginia statute the Virginia court did not acquire personal jurisdiction over the Miserandinos.

Subsequent to filing (on February 12, 1997) of the Court of Appeals' opinion, but prior to issuance of its mandate, the Attorney General of Virginia petitioned

that court for leave to intervene in the Maryland case and moved for reconsideration of its decision. On April 8, 1997 the Court of Appeals permitted intervention, but denied reconsideration, and issued its mandate.

Throughout proceedings in the Maryland courts the Miserandinos consistently contended that the first-class mail notice procedure under the Virginia substituted service statute failed to confer personal jurisdiction over them upon the Virginia court and deprived them of due process of law. Resort effectively urged that its compliance with the Virginia statutory provisions for service upon nonresidents satisfied all constitutional requirements and afforded the Miserandinos ample notice and opportunity to defend in the Virginia case.

On or about April 21, 1997 Virginia filed in the Court of Appeals of Maryland its appeal to this Court (App. 68) and on July 1, 1997 filed in this Court its instant petition for a writ of certiorari in which Resort, the real party in interest below, simply joined, as "Co-Petitioner" by "adopt[ing] and incorporat[ing] by reference herein" (Petition for Writ of Certiorari by Co-Petitioner Resort Properties, Inc. at 1) the Petition for Writ of Certiorari and the Appendix thereto submitted by the Commonwealth of Virginia.

REASONS FOR DENYING THE WRIT

Petitioners seek review by this Court of a decision of Court of Appeals of Maryland, that state's court of last resort, which patently involves a substantial federal question. They have. however, the Miserandinos submit, failed to point out that (or how) the decision so

sought to be challenged conflicts with any decision of another state court of last resort, or a United States court of appeals, or relevant decisions of this Court. They seem, rather, to rest their request for review upon their contentions that the Court of Appeals of Maryland was simply wrong in its analyses and determinations bearing upon the service of process issue on which the case there turned and that consequences of the decision may, according to them, be of such general public importance that the issues involved should be settled by this Court.

The Miserandinos are constrained to respectfully disagree. The closely and well reasoned majority opinion below is supported by the record and deals fully and correctly with the service of process issue. The decision below ~~is~~ in any event limited to the validity in the State of Maryland only of a Virginia trial court's default judgment based upon that Commonwealth's substituted service statute and have no significant effect on substituted service statutes generally.

(1) The Virginia court lacked in personam jurisdiction and its proceedings deprived the Miserandinos of due process.

The Maryland decision in issue is perhaps one of first impression in that neither courts nor counsel participating in this matter to date appear to have found or cited another case specifically and directly deciding whether (as the issue was phrased by the Court of Appeals)

> ". . . initial and original service of process by first-class mail is constitutionally suffici-

ent to confer in personam jurisdiction over a nonresident individual in a long-arm jurisdiction case"

(App. 8-9) like the instant one, which is neither in rem nor quasi in rem in nature, but is aimed solely at recovery of money for alleged breach of contract. Cf., e.g., Mullane v. Central Hanover Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), holding (despite that the trust there involved consisted of numerous small similar interests, identical with a class, so that the risk that notice might not reach every beneficiary was justifiable, since notice reasonably certain to reach most of the beneficiaries was likely to safeguard the interests of all) that newspaper publication alone did not suffice to give notice to persons interested in certain trust funds, not because it would not in fact reach everyone, but because it was not reasonably calculated to reach those who could readily be informed by other available means); Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1992), where in holding that a Kentucky statute permitting service of process in forcible entry and detainer cases by posting a summons on a tenant's apartment door, after only one effort was made to serve the tenant personally, did not satisfy minimum due process standards, this Court, though declining to decide the constitutional question there presented by determining if the particular action was one in rem or in personam, noted that it was not saying that the nature of an action has no bearing "on a constitutional assessment of the reasonableness of the procedures involved" (456 U.S. at

450); Tulsa Professional Collection Service v. Pope,485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), in which, where a creditor's assignee's claim for hospital expenses incident to a decedent's last illness had been barred because not presented within two months of newspaper notice of commencement of probate proceedings, this Court repeatedly acknowledged the need for "actual notice" (108 S.Ct. at 1347), did not at all specifically approve ordinary mailing, but noted its recognition of "mail service" (Id.) (a term which would not appear to be limited to first-class mail alone, but to encompass certified or registered (including return receipt requested) mailing as well, and concluded that, if the creditor's identity was known or reasonably ascertainable, termination of its claim without actual notice violated due process.

It may also be of some interest that in the case, Basile v. American Filter Service, Inc., 231 Va. 34 (1986), relied upon by Resort in the lower courts as conclusively establishing the validity of the Virginia substituted service statute, the critical mailings involved, though undelivered, were made not by ordinary, but by certified mail, return receipt requested. 231 Va. at 36. Attribution of constitutional, or jurisdictional, adequacy to the ordinary mail procedure permitted by the Virginia substituted service statute without regard to actual delivery or receipt of such mail was properly declined (particularly perhaps in light of the Miserandinos' categorical denial under oath of receipt of the mailing said to be involved, opposed in the record only by an unverified certificate of mailing provided by a designee of

the Secretary of the Commonwealth of Virginia) by the Court of Appeals of Maryland and was thus correctly refused recognition in that State.

It follows from its rejection of the Virginia method of securing personal jurisdiction over nonresident defendants that the Court of Appeals of Maryland was acting well within its prerogatives in refusing full faith and credit to the Virginia judgment. A Maryland court in which a foreign judgment is sought to be enforced is to make its own independent determination of jurisdictional and due process issues affecting the validity of that judgment. Imperial Hotel, Inc. v. Bell Atlantic Tri-Con Leasing Corporation, 91 Md.App.266, 603 A.2d 1371, 1374, 1375 (1992). Without valid service of appropriate notice, which is an essential prerequisite to attachment of in personam jurisdiction and a sine qua non of due process, personal jurisdiction is totally lacking and a judgment entered in Virginia in that circumstance, as occurred in the instant case, constitutes a deprivation of due process and is entitled to no faith, credit or enforcement in Maryland, since absent proper service the Virginia court had no power, i.e. had no jurisdiction, to render the judgment. Cf. Underwriters National Insurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Assoc., 455 U.S. 691, 704, 102 S.Ct. 1357, 1365, 71 L.Ed.2d 558 (1982); Durfee v. Duke, 375 U.S. 106, 110, 84 S.Ct. 242, 244, 11 L.Ed.2d 186 (1963). See also Griffin v. Griffin, 327 U.S. 320, 66 S.Ct. 556, 90 L.Ed. 665, reh. den. 328 U.S. 876, 66 S.Ct. 975, 90 L.Ed. 1645 (1966); World-Wide Volkwagen Corp. v. Woodson, 444 U.S.

286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980); Van Wagenberg v. Van Wagenberg, 241 Md. 154, 215 A.2d 812 (1966); Imperial Hotel, supra.

(2) The decision of the Court of Appeals of Maryland does not generally invalidate the Virginia substituted service statute or a similar statute of any other state, but is limited to the application of the Virginia statute to residents of Maryland.

The decision of the Maryland court of last resort is not as pervasive as petitioners seek to make it appear. Of all the fifty states presently comprising the United States, the Attorney General of Virginia appears to have been able to find only one, Minnesota, with a statute he considers sufficiently similar to Virginia's to require or warrant his notifying the Attorney General of that state that its statute may be drawn into question by the instant proceeding. See Virginia's Petition for Writ of Certiorari at 1-2. That hardly seems to present the supposed threat to the constitutional adequacy "of numerous statutes, both state and federal" (Id. at 18) (none of which are described or cited, however, as constituting a method of acquiring original personal jurisdiction) to which Virginia endeavors to allude.

The Court of Appeals of Maryland clearly and carefully limited the scope and reach of its decision solely to the effect to be accorded the Virginia judgment in Maryland. For example, it concluded its opinion by stating:

> "Accordingly, although the judgment may remain valid where entered until there is a contrary

> ruling by a court of competent jurisdiction, we decline to grant full faith and credit to the judgment because of our finding that the Virginia trial court did not acquire personal jurisdiction over these defendants because of the constitutional inadequacy of notice." (App. 29).

That language scarcely seems likely "to 'wreak havoc' on creditors' practice in Virginia" (Virginia's Petition for Writ of Certiorari at 5) or elsewhere. It seems, rather, to clearly indicate an admirable intent to confine the effect of the Maryland court's ruling solely to the efficacy of the Virginia ordinary mail procedure for service on nonresidents as sought to be applied to residents of Maryland. It does not raise the sort of nationwide "threat" to statutes of other states that Virginia (apparently in an effort to attract the attention of this Court) seeks to imply arises from it. It is a well founded and sound decision. It leaves the Virginia statute and the procedure thereunder intact in that Commonwealth. It makes no effort to affect the impact, if any, of either the Virginia statute or the Maryland decision on any other state. It does not create a situation of national public importance. It does not require review by this Court.

(3) Virginia should not be accorded standing to challenge the Maryland decision in this Court.

Virginia, having participated only marginally in the court below - and then only after the opinion setting out its decision was filed - and having suffered no actual loss or damage (as opposed to

mere unestablished fanciful, conceivable, supposed or speculative potentialities) from or as a result of the Maryland decision, ought not to be accorded standing to attack that decision in this Court. Virginia has neither suffered nor demonstrated any actual injury. Its Attorney General complains of what he fears to be the alleged potentiality of that decision, according to him, to "wreak havoc on the enforceability of Virginia judgments in Maryland and across the country" (Virginia's Petition for Writ of Certiorari at 18). apparently premised upon his earlier reference to a news item appearing in a Virginia weekly newspaper (Id. at 7), but offers no specific or concrete instances where that or anything like that happened. That the Commonwealth of Virginia, or its Attorney General (or collection lawyers or agencies there), may be disturbed by mere fears that the Maryland decision may make their activities more burdensome would not seem to amount to any actual injury qualifying Virginia for standing in this case (or, for that matter, presenting any valid reason for this Court's intervention).

It has been held by this Court that the constitutional dimension of standing theory requires that there at least be an "'actual injury redressable by the court'", Director, Office of Workers Comp. Programs v. Perini North River Assocs., 429 U.S. 297, 305, 103 S.Ct. 634, 640, 74 L.Ed.2d 465 (1963), quoting from Simon v. Eastern Kentucky Welfare Org., 426 U.S. 26, 39, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1976). And it appears that standing to appeal is a pertinent issue to be presented to an

appellate court. See Bryant v. Yellin, 447 U.S. 352, 366-68 and nn. 17, 18, 100 S.Ct. 2232, 2240 and nn. 17, 18, 65 L.Ed.2d 184 (1980), where residents of Imperial Valley, California, filed an appeal as intervenors from a district court decision in an action in which the United states, as plaintiff, unsuccessfully sought a declaration that irrigation water could not be used for landholdings larger than 160 acres. After the district court ruled against the United states, which forwent an appeal, the intervenors, most of whom were farm workers, were accorded standing for purposes of appeal on the basis that if the limit on irrigation were upheld, large landholders would sell excess land and would be required by an applicable statute to do so at prices far below market value, so that the intervenors, who desired to purchase such land for farming, would benefit from the resulting windfall. The Miserandinos respectfully submit that the intervenors in Bryant thus had a far more specific and concrete basis for intervention than is established in this case by Virginia's mere fears and that both the constitutional and the prudential restrictions applicable to standing issues militate against recognizing standing on the part of Virginia to pursue its appeal in this case. In addition to the circumstance that Virginia has sustained no actual damage, its last minute, post-decisional intervention effectively has given Resort, the real party in interest opposing the Miserandinos, a "free ride", as perhaps is amply illustrated by comparing the 23 page petition for certiorari, accompanied by a 263 page

appendix, submitted by Virginia with the one page "piggyback" petition filed by Resort. The Miserandinos, while they certainly do not quarrel with the concept that all are equal before the law, regardless of the extent of their respective assets, respectfully suggest that Virginia's presence only exacerbates an already substantial financial imbalance in Resort's favor, as compared to them, with respect to ability to continue this already relatively protracted litigation. That, they suggest, perhaps warrants attention as a possible prudential consideration in determining Virginia's status with respect to standing.

CONCLUSION

For the reasons stated herein, this case does not merit further review by this Court and the respective Petitions for Writ of Certiorari filed by Virginia and by Resort should be denied.

Respectfully submitted,

BENJAMIN LIPSITZ,
Counsel of Record
for Respondents